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## FISCAL IMPACT REPORT

ORIGINAL DATE 2/2/07  
 LAST UPDATED 2/26/07      HB 336/aHJC

SPONSOR Gardner

SHORT TITLE Prohibit Certain Uses of Images of Children      SB \_\_\_\_\_

ANALYST Ortiz

### APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY07	FY08		
	NFI		

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

- Attorney General’s Office (AGO)
- Corrections Department (CD)
- Administrative Office of the District Attorneys (AODA)
- Administrative Office of the Courts (AOC)
- Public Defender Department (PDD)
- Department of Public Safety (DPS)

### SUMMARY

#### Synopsis of HJC Amendment

House Judiciary Committee Amendment inserts the underlined into the following:

- It is unlawful for a person to intentionally manufacture any obscene visual or print medium depicting any prohibited sexual act or simulation of such an act if that person knows or has reason to know that the obscene medium depicts a prohibited sexual act or stimulation of such an act and if that person knows or has reason to know that a real child under eighteen years of age, who is not a participant, is depicted as a participant in that act. A person who violates the provisions of this subsection is guilty of a fourth degree felony.

#### Synopsis of Original Bill

House Bill 336, Prohibit Certain Uses of Images of Children, seeks to amend the criminal statute outlawing sexual exploitation of children to add provisions to outlaw images that depict children

who are not actually participants in the displayed sexual activity. This technique, commonly known as “morphing”, is used to digitally morph children’s faces or other body parts onto actual depictions of sexual activity so that it appears that the children are engaging in the sexual activity.

## **SIGNIFICANT ISSUES**

The Public Defender Department notes that NMSA 1978, § 30-6A-3 already penalizes the manufacture or distribution of pornography depicting actual children. This bill would most likely be found unconstitutional under the First Amendment in light of *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 122 S.Ct 1389 (2002).

The Attorney General’s Office draws attention to the following cases. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), the Supreme Court declined to extend *New York v. Ferber*, 458 U.S. 747 (1982), to computer generated or virtual child pornography. *Ferber* held that there was no First Amendment right to possess or generate child pornography and that states could legally pass content-based regulations banning it. *Ferber* depended upon a wealth of empirical evidence as to harm generated by child pornography. In *Free Speech*, the Court found this empirical evidence did not extend to virtual child pornography where no actual children are depicted. However, as to morphing the Court noted in dicta:

“Section 2256(8)(C) [of the federal Child Pornography Prevention Act of 1996] prohibits a more common and lower tech means of creating virtual images, known as computer morphing. Rather than creating original images, pornographers can alter innocent pictures of real children so that the children appear to be engaged in sexual activity. Although morphed images may fall within (8<sup>th</sup> Cir. 2005) (defendant’s conviction was upheld where the image shown the head of a well known child entertainer morphed upon the photograph of a sexually explicit photograph of a young nude boy – the court the definition of virtual child pornography, they implicate the interests of real children and are in that sense closer to the images in *Ferber*. Respondents do not challenge this provision, and we do not consider it.”

*Id.* at 242. *See also, United States v. Sims*, 428 F.3d 945, 956 n.4 (10<sup>th</sup> Cir. 2005) (noting that *Free Speech* expressly did not decide the constitutionality of morphing).

In the wake of *Free Speech*, most courts now find that the government must be able to prove that a real child was depicted and therefore harmed. It need not be an identifiable victim, i.e. one that can come to court to testify, but must be a real child that was harmed. *See e.g., United States v. Bach*, 400 F.3d 622 found that the image involved a real child who was victimized every time the photograph was displayed).

## **PERFORMANCE IMPLICATIONS**

The Corrections Department reports that it may impact programs if there were increased convictions. In the Albuquerque area, there is a sex offender supervision unit or program that supervises 25 offenders at the extreme and high levels of supervision and 50 offenders at the medium and low levels of supervision. The other areas of the state do not have a specialized unit, and this requires sex offenders in the rest of the state to sometimes have to be supervised by probation and parole officers with larger caseloads.

**TECHNICAL ISSUES**

One suggestion presented by the AGO is to explicitly include the term “morphing” and draft an accompanying definition in the statute to avoid any claim of confusion.

**WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

The gap in the current law will continue to be available to predators that use the current law and technology to pursue their criminal enterprise and further victimize children and society.

EO/mt